IN RE FAUZILAH ASMARA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CRIMINAL REVISION NO: 43-01-2001]
6 FEBRUARY 2001

PROTECTION OF WOMEN: *Removal to place of refuge - Interim detention order - Legality - Girls working in karaoke lounge - Whether must necessarily be exposed to moral danger - Absence of evidence of ill-treatment - Absence of evidence of neglect - Whether order unsustainable - Women and Girls Protection Act 1973, s. 8(1) - Federal Constitution, art. 5(1)*

The two girls in this case, aged 19 years 8 months and 19 years 11 months respectively, were working as guest relations officers in a karaoke lounge when they were arrested pursuant to the provisions of the Women and Girls Protection Act 1973 ('the Act'). They were brought before the magistrate's court, whereupon an order was made that they be held pursuant to s. 8(1) of the Act, pending a report by the welfare officer. It was not in dispute that, apart from the facts that the under-aged girls were then working in a karaoke lounge, and putting on scantily clad dresses, there was no other material presented to the learned magistrate to show that they were in any way exposed to moral danger or being ill-treated or neglected. The girls were dissatisfied with the order, and in the circumstances urged the High Court to exercise its supervisory and revisionary powers under s. 35 Courts of Judicature Act 1964 and examine the propriety of the learned magistrate's order.

Held:

[1] Article 5(1) of the Federal Constitution provides that no person shall be deprived of his or her personal liberty save in accordance with law. It being one of the fundamental rights guaranteed by the Constitution, the law authorising its deprivation must be interpreted and applied strictly. (p 221 d)

[2] Section 8(1) of the Act authorises the magistrate to make the order if "the magistrate believes…". This qualification has no meaning and offers no protection unless it is read as requiring that there must be sufficient material before the magistrate to enable the magistrate to hold the belief judicially. (p 221 e)

[3] Although an order under s. 8(1) is an interim order pending the result of a report, it nevertheless requires more than mere suspicion or possibility of ill-treatment, or neglect and exposure to moral danger, and need of protection, to justify the limitation to the right of personal

liberty. The words "to have been" in the section means that there must be a clear assertion by the party making the application of facts which showed: (i) ill-treatment; or (ii) neglect and exposure to moral danger such that the subject needs protection. (p 222 h)

[3a] Hence, a bare assertion that there was ill-treatment, or neglect and exposure to moral danger, and that the subject needs protection, without asserting the attendant circumstances which the magistrate can consider and evaluate, as was the case here, is not sufficient. (p 223 a-b)

[4] There was no evidence that the girls here were being ill-treated. No evidence was also given that the karaoke lounge was a place of immoral activities. To say that karaoke lounges generally were places of immoral activities is a prejudgment that cannot be supported. More than that, there was no evidence that the girls were held by their employers or other persons or forced to work in such places against their will. There was thus a complete absence of assertion that the girls needed protection. (p 224 d-f)

[5] Even if the girls were exposed to immoral activities while working in the karaoke lounge, the fact remains that there was no assertion that they were so exposed where they were residing, such that they needed to be moved to a place of refuge. If the place a subject is staying in is itself not a place of ill-treatment, or a place of neglect and exposure to moral danger, it is unnecessary to have her moved to a place of refuge. (p 224 g-h)

[Order of magistrate set aside.]

Case(s) referred to:
Polis Di Raja Malaysia v. Keong Mei Cheng Audrey [1994] 3 CLJ 362 ***(refd)***
In Re The Detention Of S Sivarasa & Ors [1997] 1 CLJ 471 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 35
Criminal Procedure Code, ss. 117(i), 119
Federal Constitution, art. 5(1)
Women and Girls Protection Act 1973, s. 8(1)

For the appellants - Judy Toh Ah Noi; T/n Kanesalingam & Co
For the respondent - Vong Poh Fah DPP

Reported by WA Sharif

JUDGMENT

Abdul Wahab Patail J:

The girls, Fauzilah bte Asmara, aged 19 years 8 months, and Imelia Hariza bte Isnin, aged 19 years 11 months worked as guest relations officers in one of those places of entertainment commonly known as a karaoke lounge. They were arrested on 14 January 2001 at about 11pm on the premises of the licensed karaoke lounge by the police and brought before the magistrate's court on 15 January 2001.

The magistrate's court was informed in respect of each as follows:

The girls were ordered to be held under s. 8(1) of the Women and Girls Protection Act 1973 (the Act) which provides as follows:

> 8(1) Any female person under the age of twenty-one years whom the Court of a Magistrate believes to have been ill-treated or neglected **and** exposed to moral danger **and** to need protection, **may** subject to subsection (6) by warrant issued by the Court be ordered to be removed to a place of refuge and there detained until an enquiry under subsection (3) to enquire into the circumstances of her case has been completed and a report of the enquiry has been submitted to the Court for determining whether any warrant or order may be made under subsection (4) in respect of such female person.
>
> (6) No female person who attains the age of twenty-one years or over at the time of her removal to a place of refuge under section 7 or subsection (1) of this section shall be detained therein.

The Elements Under Section 8(1)

With reference to s. 8(1) of the Act, it is obvious that if a girl is ill-treated it is superfluous to impose a requirement she is also exposed to moral danger. On the other hand, if she is merely neglected, the operation of s. 8(1) is attracted only if she is also exposed to moral danger. The general rule that the term "… and …" generally requires that all the elements encompassed by the term has to be shown, applies only as the context requires. Where she has been a) ill-treated or b) neglected and exposed to moral danger, then only the question arises for consideration whether she is in need of the protection of a place of refuge under s. 8(1).

The elements of s. 8(1) are therefore as follows:

a) The female is under 21 years; and

b) has been

i) ill-treated or

ii) neglected and exposed to moral danger; and

c) to need protection.

Applications Under Section 8(1)

The learned deputy public prosecutor had submitted that the procedure for applications under s. 8(1) of the Act is similar to remand proceedings under s. 117 of the Criminal Procedure Code, since although the order results in the detention of the subject person in respect of whom the application is made, the order made is interim in nature not unlike an injunction, to enable the social welfare officer to prepare a report, based upon which a final order is made. He described the Act as a piece of social legislation, and submitted that it be given a liberal meaning.

Article 5 para. (1) of the Federal Constitution provides that no person shall be deprived of his or her personal liberty save in accordance with law. It being one of the fundamental rights guaranteed by the Constitution, the law authorising its deprivation must be interpreted and applied strictly. Section 8(1) authorises the magistrate to make the order if "… the magistrate believes …". The qualification would have no meaning and offer no protection unless it is read as requiring that there must be sufficient material before the Magistrate to enable the magistrate to hold the belief judicially. In this regard the learned deputy public prosecutor is entirely correct in suggesting a similarity with remand proceedings. In *Polis Di Raja Malaysia v. Keong Mei Cheng Audrey* [1994] 3 CLJ 362 at p. 365 Syed Ahmad Idid J commented on the requirement under s. 117(i) remands. The police had applied for remand to complete investigations. After discussing the format of the diary and the details needed therein it was observed:

> ... These details provide the true proceedings in the investigation in compliance with what is required by s. 119(1) of the CPC. A copy of this is what the officer must supply the Magistrate under s. 117. This to obviate the necessity of the Magistrate having to examine the complainant and recording the examination (see Ch. XV and s. 133; compare s. 117(3) with s. 135(2) of the CPC). So I have at this stage to say that the police in this case did not transmit to the Magistrate a copy of the proper entries in the diary. This goes against the requirements of s. 117. How then could the Magistrate (or Registrar in our case) make any decision to continue detention of the respondent? As a matter of law, not only must the diary be in the form specified by s. 119 of the CPC **but it must also be replete with grounds indicating that the information against the accused (or respondent) is well-founded** ... . [Emphasis added]

Useful reference may also be made to *In Re The Detention Of S Sivarasa & Ors* [1997] 1 CLJ 471, where his Lordship KC Vohrah J cited the above with approval.

The application under s. 8(1) is made before the court of a magistrate, not magistrate. Other than an oral application made in the course of proceedings, the normal manner of making an application in a court is by way of a written application supported by affidavits as to facts, where the deponents may be required by prior notice to attend to be cross-examined. Other that those facts proof of which is excepted from the rule of proof by evidence, such as judicial notice, some evidence must be placed before the magistrate.

Section 119 of the Criminal Procedure Code (the Code) makes an exception to the general rule firstly by requiring the investigating officer to maintain a diary of proceedings in investigation, and secondly by s. 117(i) allowing a copy of the entries of that diary or record of his acts in investigation, to be submitted to the magistrate when applying for remand, in place of oral or affidavit evidence of the investigating officer to support the application for remand. Nothing in the Act in this case creates the official duty to keep of an official diary as a record, and nothing in s. 8 alludes to the manner how an application under s. 8(1) is made. In such circumstances therefore, an application in the usual manner of an application supported by affidavit should be produced.

Greater caution is necessary in s. 8(1) applications that in applications for remand under s. 117 of the Code since s. 8(1) would authorise detention for a month, and not from time to time not exceeding 15 days in the whole. While s. 117 deals with a suspect who by law is presumed innocent until proven guilty, the person sought to be detained under s. 8(1) is not only an equally innocent person and in addition is not a suspect. The Act, which is for the protection of women and girls, must be interpreted in that spirit, and not in a manner that it becomes oppressive to women and girls generally, but applied only to those who genuinely need to be protected. Nothing is sadder than legislation, made with the best of intentions, which because it is incautiously applied, becomes seen as oppressive.

Although an order under s. 8(1) is an interim order pending the results of a report, it nevertheless must require more than the suspicion or possibility of ill-treatment, or neglect and exposure to moral danger, and need of protection, to justify the limitation to the right of personal liberty. The words in s. 8(1) "…. to have been …." means there must be a clear assertion by the party making the application, of facts that if true shows a) ill-treatment or b) neglect and exposure to moral danger, such that the subject needs protection. A bare assertion by the social welfare officer or police, however clear and direct, there

was ill-treatment, or neglect and exposure to moral danger, and that the subject needs protection, without asserting the circumstances found by such social welfare officer in his preliminary investigation before making the application, which the magistrate can consider and evaluate, and come to his own conclusion to believe whether there was such ill-treatment, or neglect and exposure to moral danger, and that the subject needs protection, is not sufficient. The discretion to make the order is a discretion of the magistrates court. It is to be exercised judicially. The magistrate must be given the material upon which to base his or her own belief, and not substitute that with the belief of the applicant social welfare officer, before making the order. This is separate and distinct function from that at the hearing of the report to be prepared which is to verify those circumstances alleged, which if borne out by investigation would prove ill-treatment, or neglect and exposure to moral danger, and that the subject needs protection. Upon such proof, a final order could be made.

The magistrate must consider in respect of each element what are the circumstances alleged. Only when the magistrate believes on the basis of the circumstances alleged, that elements a) and b) exist, and the subject needs to be protected, does the discretion arise where the magistrate may or may not order the girl's removal to a place of refuge.

Ordinarily a person who needs a place of refuge would volunteer to be admitted to such a place. That a person is reluctant to be so admitted puts the magistrate on notice to consider the need for protection with particular care. An order of removal into a place of refuge must be considered carefully. A refuge is a place of protection, shelter or asylum and an escape from ill-treatment or exposure to immoral activities. The discretionary power is to protect the individual. The power must be sparingly applied as it involves a restriction on personal liberty of the person against whom it is made. If the interpretation given is too liberal in favour of its exercise, the power to protect itself becomes a threat to personal liberty, and defeats its purpose in society. It is a power to be applied only when there is no other alternative.

The need for protection is inter-related to the question whether the magistrate ought to exercise his discretion, which must be exercised judicially, in favour of making an order under s. 8(1). It requires an objective and reasoned assessment by the magistrate that the subject needs the protection, and not that some other person believes that the subject ought to be protected in a place of refuge.

The Application In This Case

In these two instances:

i) Age: the girls are under the age of 21 years;

ii) Ill-treatment: there is no evidence the girls are ill-treated;

iii) Neglect and exposure to moral danger: the only assertion towards exposure to moral danger are that they were working in a karaoke lounge as guest relations officers and wearing skimpy top-clothing which incidentally appear from the description to be better than swimsuits.

As to neglect and exposure to moral danger, there is no assertion let alone evidence, the said karaoke lounge is known to be a place of immoral activities. There is no assertion let alone evidence, of actual immoral activities on the premises. It is possible they are exposed to moral danger in a karaoke lounge, but it is no more possible to be so exposed in a karaoke lounge than in any other place, including the home. The threshold to satisfy the elements of s. 8(1) cannot be a mere possibility of ill treatment or neglect and exposure to moral danger, and need of protection. To say that karaoke lounges generally are places of immoral activities would be sailing into the realm of prejudgment and prejudice, and cannot be supported.

As to the need for protection, it was argued they needed protection. There is no assertion they are held by their employers or other persons, or forced by their parents to work in such place, against their will. There was a complete absence of any assertion that the gisls needed protection, be it from their employers, families or other persons. There was no material upon which to base the belief that they needed protection.

The question that a person needed protection includes consideration of what it is the person is to be protected from. Only if she needs to be protected from ill-treatment or neglect and exposure to immoral activities from the place she is staying in, or she is a person who needs protection from herself regardless of where she is staying, that she needs to be put into a place of refuge. Even if there were exposure to immoral activities while working in the karaoke lounge, the fact remains there is no assertion they were so exposed where they are residing, such that they need to be moved to a place of refuge. If the place a subject is staying in is not itself a place of ill-treatment, or a place of neglect and exposure to moral danger, then it is unnecessary to have her moved to a place of refuge. In these two instances, there is no assertion they are under any such threat or compulsion as to require the protection of a place of refuge. There is no assertion they were held against their wishes in the karaoke lounge. If they were living at home with their families, there is no assertion their families were the persons ill-treating them or exposing them to any immoral activities.

If the argument is that by willingly working in the karaoke lounge, they needed to be protected from themselves, then there must be assertion that they refused to cease to work in such places.

Conclusion

In exercise of the powers of supervision and revision under s. 35 of the Courts of Judicature Act 1964, the order of the magistrate is set aside and above persons are ordered to be released immediately.

The girls were nevertheless advised, as a measure to avoid a similar unpleasant experience in the future to avoid working in karaoke lounges or similar places.